Office - Supreme Court, U.S.
FILED
APR 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1412

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LIANE BUIX MCDONALD,
on her own behalf and on behalf
of all others similarly situated,
Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION

STEPHEN B. MOLDOF
(Counsel of Record)
PETER HERMAN
COHEN, WEISS AND SIMON
330 West 42nd Street
New York, NY 10036
(212) 563-4100
Counsel for Respondent
Association of Flight Attendants

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, on the basis of the specific factual circumstances of this case, the Court below properly declined to modify the burden of proof standard adopted by the District Court and rejected petitioner's demand that all cases decided adversely to claimants be retried, when petitioner clearly understood the burden of proof standard and yet delayed mounting any challenge thereto before any court until after hundreds of trials had been held?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	5
CONCLUSION	13

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 8
Arlinghaus v. Ritenour, 622 F.2d 629 (2d Cir.), *cert. denied*, 449 U.S. 1013 (1980) 13
Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) 10
Avondale Shipyards, Inc. v. Vessel Thomas E. Cuffe, 434 F.Supp. 920 (E.D. La. 1977) 8, 9
Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955) 7, 10
Brenner v. World Boxing Council, 675 F.2d 445 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982) 9
Browzin v. Catholic University of America, 527 F.2d 843 (D.C. Cir. 1975) 9
Cannon v. University of Health Sciences/The Chicago Medical School, 710 F.2d 351 (7th Cir. 1983) 8
City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 13
Commissioner v. Gordon, 391 U.S. 83 (1968) 13
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 7
Coyner v. United States, 103 F.2d 629 (7th Cir. 1939) 8
Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976) 7, 8, 9
Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1 (1980) 7, 11
Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) 11, 12
Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) 8
Diamond Door Co. v. Lane-Stanton Lumber Co., 505 F.2d 1199 (9th Cir. 1974) 8
Ellis v. City of Chicago, 667 F.2d 606 (7th Cir. 1981) 9

TABLE OF AUTHORITIES—Continued

Page

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 7
Franki Foundation Co. v. Alger-Rau & Associates, Inc., 513 F.2d 581 (3d Cir. 1975) 7
Franks v. Bowman Transportation Co., 424 U.S. 727 (1976) 2, 9
Hayes v. Foodmaker, Inc., 634 F.2d 802 (5th Cir. 1981) 8
In Re Chicken Antitrust Litigation American Poultry, 669 F.2d 228 (5th Cir. 1982) 8
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 2, 4, 10
Kay v. Austin, 621 F.2d 809 (6th Cir. 1980) 10
Langnes v. Green, 282 U.S. 531 (1931) 8
Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976) 8
McDonald v. United Air Lines, Inc., 587 F.2d 357 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979) 2, 7, 11
McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982) 10
Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 11, 12
Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976) 8
Retail Store Employees Union, Local 782 v. Sav-on Groceries, 508 F.2d 500 (10th Cir. 1975) 12, 13
Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339 (1913) 8
Rogers v. Societe Internationale, Etc., 278 F.2d 268 (D.C. Cir. 1960) 8, 9
Romasanta v. United Air Lines, Inc., 27 EPD ¶ 32,353 (N.D. Ill. 1982), *aff'd*, 717 F.2d 1140 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1928 (1984) 2, 7
Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) 7
Sherrill v. Royal Industries, Inc., 526 F.2d 507 (8th Cir. 1975) 7
Skogen v. Dow Chemical Co., 375 F.2d 692 (8th Cir. 1967) 9

TABLE OF AUTHORITIES—Continued

	Page
Spaulding v. University of Washington, 740 F.2d 686 (9th Cir.), *cert. denied,* 105 S.Ct. 511 (1984)	8
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	4
Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982)	9
Trustees of Joint Welfare Fund of Int'l Union of Operating Engineers v. Nolan, 549 F.2d 871 (2d Cir. 1977)	8
United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977)	1
United States v. Cline, 388 F.2d 294 (4th Cir. 1968)	8
USAchem, Inc. v. Goldstein, 512 F.2d 163 (2d Cir. 1975)	10
Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978)	11, 12
Williams v. Rhodes, 393 U.S. 23 (1968)	10
Statutes:	
Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.	4, 9
United States Code	
28 U.S.C. § 1292(a)(1)	10
§ 1292(b)	2, 7
§ 2106	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1412

LIANE BUIX MCDONALD,
on her own behalf and on behalf
of all others similarly situated,
Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION

STATEMENT OF THE CASE

A. The original underlying action was directed at a "no-marriage" rule maintained by United Air Lines ("United") which previously had been eliminated and declared illegal sex-based discrimination. 2a.[1] After Liane McDonald intervened, *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), a class was certified.

---

[1] Citations of Opinions and Orders of the Courts below are to pertinent pages in Petitioner's Appendix ("a"). Other citations are to the record on appeal ("R." or "S.R.").

In 1978, the Court of Appeals held that claimants who resigned from United "must, as counsel for the plaintiff acknowledged . . . show that their retirement was involuntary and on account of the invalid rule to be entitled to relief," *McDonald* v. *United Air Lines, Inc.*, 587 F.2d 357, 360 n.4 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979), and that the burden of establishing entitlement would be more difficult for those who, unlike the original plaintiffs, had resigned without demonstrable protest. *Id.*

On remand, the Association of Flight Attendants ("AFA") intervened to represent the incumbent flight attendants. With the concurrence of all parties, the District Court first resolved the classwide reinstatement/seniority issues. Following a trial under the guidelines of *Franks* v. *Bowman Transportation Co.*, 424 U.S. 727 (1976), the Court concluded that claimants who could establish that they left United involuntarily because of the no-marriage rule would be eligible for reinstatement with full retroactive seniority for compensation and benefits, but with partial retroactive seniority for competitive purposes, because full competitive seniority would cause unprecedented "unusual adverse impact" to incumbents and therefore could not equitably be awarded. *Romasanta* v. *United Air Lines, Inc.*, 27 EPD ¶ 32,353 (N.D. Ill. 1982). McDonald promptly obtained interlocutory review pursuant to 28 U.S.C. § 1292(b). The Court of Appeals affirmed in all respects, concluding, *inter alia*, that, consistent with *Franks*, the class had been awarded the fullest possible relief which would not result in unusual adverse impact to incumbents. *Id.*, 717 F.2d 1140, 1157, 1159-60 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1928 (1984).

In conformance with *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 371, 376 (1977), the District Court directed that individual entitlement hearings be held before special masters pursuant to an Order of Reference. 34a-40a. Paragraph 4

of that Order provides that "[t]he claimant has the burden of proving that she is a member of the class," 4a, 36a; paragraph 5 provides that, upon proof that a claimant was married within 90 days of her resignation from United, "the burden of going forward" shifts to those opposing reinstatement. 4a; 36a.

No party challenged the burden of proof standard of paragraph 4 of the Order of Reference. Prior to commencement of any entitlement hearings, AFA moved to reconsider paragraph 5, urging that a claimant's marital status contemporaneous with resignation should only be an additional factor providing "some indication" as to the cause of resignation, under paragraph 6 of the Order. 5a. McDonald's opposition to the motion, quoted in the decision below, explicitly recognized that regardless of any shift in the burden of production, "*the burden of persuasion* that the termination is because of the [no-marriage] rule *stays on the claimant.*" 5a (emphasis added).

The District Court, orally ruling upon AFA's motion, held that the mere showing of marriage within 90 days of termination would be insufficient to shift even the burden of going forward, S.R.1239, Vol. 4 at 4-5, and reiterated that, in accordance with paragraphs 4 and 5 of the Order of Reference, only "the burden of going forward, not the burden of persuasion," shifted to defendant once a claimant "has made a prima facie case," *id.* at 5; "the burden of proof always remains on the plaintiff." *Id.* at 6.

It was not until nearly nine months after issuance of the Order of Reference and after hundreds of entitlement hearings that McDonald first challenged the Order's burden of proof standard in conjunction with her request that the District Court review the masters' rulings in ten individual entitlement cases. 9a; 5a-6a; R.927. The District Court adhered to the requirement

of the Order of Reference that claimants bear the burden of proving entitlement, 22a-23a, and rejected McDonald's claim that the masters had applied fixed evidentiary rules to determine entitlement. 23a-24a.

While McDonald claimed that modification of the burden of proof standard would require rehearings of all entitlement decisions adverse to claimants, 9a; 21a-22a, she opposed any stay of entitlement hearings, R.733; S.R.1239, Vol. 5, and deferred processing her appeal before the Seventh Circuit until the District Court reviewed additional individual entitlement decisions. 2a-3a; 29a-33a. By the time the burden of proof issue was considered by the Court of Appeals, over 600 entitlement hearings had been held. 9a; S.R.1266-1288.

B. The Court of Appeals held, as it had in 1978, that "resignees must carry the burden, in order to be considered class members, of proving that they did resign involuntarily," 6a n.2, for "only those who were in fact injured are entitled to relief." 7a. Recognizing that "each Title VII case may be unique in its own factual setting," 8a, and finding that neither *Teamsters* nor *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), fit the circumstances presented, the Court directed its focus to the "unique . . . factual setting" of this case. 6a-8a.

The Court of Appeals found the distinct burdens of proof and production of paragraphs 4 and 5 of the Order of Reference "abundantly clear," 8a, and never altered by the District Court. 9a. Nevertheless, although it was "clear that the plaintiffs interpreted the Order of Reference to shift only the burden of production, and not the burden of proof, to the defendant once the claimant has made the threshold showing," 5a, McDonald "failed to object to the Order when [she] had ample opportunity to do so before the beginning of the individual hearings," and "wait[ed] to challenge the Or-

der until after several hundred hearings ha[d] been held." 9a; 5a-6a. The Court concluded that under such circumstances, to suddenly alter the burden of proof and permit McDonald to "force rehearings" of the hundreds of entitlement decisions adverse to claimants would "not further the goal of efficient judicial administration," 9a, in this already "long and tortuous" litigation. 1a. Turning to McDonald's challenge to the application of the principles of the Order of Reference in nine individual cases, the Court of Appeals affirmed six, remanded two for further fact-finding, and reversed one. 11a-17a. McDonald's Petition for Rehearing was denied. 86a-87a.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Appellate Court's Acceptance of the Burden of Proof Standard Established by the District Court and Applied, Without Objection, in Hundreds of Cases, Is Consistent With Rulings of This Court and Other Circuits and Does Not Merit Supreme Court Review.

A. The petition rests on the erroneous premise that the decision below enunciates a general "rule" or "policy" requiring "parties in complex litigation" to pursue piecemeal appeals from interlocutory orders or forfeit their right to appellate review. Petition ("Pet."), pp. 8-13. The ruling does nothing of the kind; it is grounded in and limited to the "unique . . . factual setting" of this case, 8a, which revealed the clear inequity of permitting McDonald to secure retrials of hundreds of cases when such drastic consequences could have been avoided had McDonald promptly challenged the "abundantly clear" burden of proof standard, 8a, which governed the conduct of those trials. This fact-based ruling does not merit Supreme Court review.

The Court of Appeals properly found that McDonald was aware from the time the District Court issued its Order of Reference that the Order "shift[ed] only the burden of production, and not the burden of proof," to

defendant once a claimant established a prima facie case and that the ultimate "burden of persuasion" always "stays on the claimant." 5a. Despite the fact that the District Court never altered that standard, 9a, McDonald mounted no challenge to the burden of proof "until after several hundred hearings [had] been held." *Id.*[2] Even after the District Court rejected her tardy challenge, she resisted any stay of entitlement hearings and deferred processing her appeal, so that by the time the Court of Appeals considered the matter, over 600 hearings had been held. S.R.1266-1288. It was these specific factual circumstances, not some broad "rule," which prompted the Court to reject McDonald's attempt to modify the Order of Reference and "force rehearings" of hundreds of entitlement claims. 9a.

The Court's careful analysis of the record negates McDonald's assertion that her appeal was rejected as "unreviewable." Pet., pp. 7, 11, 13. On the contrary, the Court considered the issues presented and, taking into account the specific factual circumstances, refused to alter the burden of proof established by the District Court, affirming, reversing, and remanding the various matters appealed. 3a.

B. McDonald's suggestion, Pet., pp. 8-11, 13, that this fact-based ruling "places in peril all claimants" and threatens the policy against piecemeal appeals, ignores the purposes of that policy and the basis for the ruling below.

---

[2] McDonald's contention that the burden of proof standard was under continued reconsideration and modification, making an earlier challenge "premature," Pet., pp. 4, 6, 9-10 and n.7, 14, is rejected by the record. 9a. Moreover, the District Court's September, 1983 Opinion, which contains the only alleged modification McDonald cites, not only fully "reject[ed] the contentions advanced by plaintiffs," 21a, but followed, and hence could not possibly have prompted, McDonald's belated challenge to the burden of proof standard. R.927.

The Seventh Circuit's decision nowhere postulates that McDonald was obligated to have initiated interlocutory appeals, even from the Order of Reference; perforce, it does not "unsettle" any "longstanding black letter rules," Pet., p. 9, by creating a general requirement that litigants pursue interlocutory appeals.[3] Instead, the Court held that McDonald could not allow hundreds of trials to take place under an "abundantly clear" burden of proof standard, 8a, without mounting *any challenge* before *any* court, then suddenly insist that the established standard was erroneous and that all entitlement cases lost by claimants must be retried.[4] The Court's determination finds its basis in the same "interest of sound judicial administration," *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 8 (1980) (quoting *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956)), which underpins the policy against piecemeal appeals. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 473 (1978); *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 178 (1955), cited in Pet., pp. 8-10. *Cf.* 9a.

Similar concern for the "proper and efficient administration of the judicial process," *Cruz* v. *Hauck*, 515 F.2d 322, 331 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976), has prompted appellate courts to consistently re-

---

[3] McDonald's present disparagement of interlocutory appeals and motions for reconsideration, Pet., pp. 10-11 and n.8, contrasts with her repeated prior resort to such avenues to obtain immediate review of District Court rulings, *see, e.g.*, 717 F.2d at 1144 (§ 1292(b) appeal of seniority/reinstatement decision, following unsuccessful motion to reconsider); 587 F.2d 357 (§ 1292(b) appeal from class certification decision), including review of provisions of the Order of Reference. R.689 (motion to modify Order of Reference regarding scheduling of hearings); R.826 (motion to reconsider cut-off dates in Order of Reference).

[4] In contrast, in *Franki Foundation Co.* v. *Alger-Rau & Associates, Inc.*, 513 F.2d 581 (3d Cir. 1975) and *Sherrill* v. *Royal Industries, Inc.*, 526 F.2d 507 (8th Cir. 1975), Pet., p. 11 n.8, appellants promptly apprized the District Courts of alleged errors.

fuse to vacate district court referrals of matters to masters when no objections to the references were raised prior to the parties proceeding before the masters. *E.g., id.*; *Rogers* v. *Societe Internationale, Etc.*, 278 F.2d 268 (D.C. Cir. 1960); *Diamond Door Co.* v. *Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1205-06 (9th Cir. 1974); *Coyner* v. *United States*, 103 F.2d 629, 635 (7th Cir. 1939); *Hayes* v. *Foodmaker, Inc.*, 634 F.2d 802, 803 (5th Cir. 1981); *Spaulding* v. *University of Washington*, 740 F.2d 686, 695 (9th Cir.), *cert. denied*, 105 S.Ct. 511 (1984); *see also Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1324 (5th Cir. 1976) (attack upon bifurcation order rejected when "nothing was done" to object before trial commenced). The fact that litigants retain the "right" to appeal from interlocutory referral orders when final orders issue,[5] Pet., pp. 10-11, does not foreclose the courts from "locat[ing] 'a just result' in light of the circumstances peculiar to the case." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425-26 (1975) (quoting *Langnes* v. *Green*, 282 U.S. 531, 541 (1931)). *Cf. Cannon* v. *University of Health Sciences/The Chicago Medical School*, 710 F.2d 351, 357-63 (7th Cir. 1983) and *Avondale Shipyards, Inc.* v. *Vessel Thomas E. Cuffe*, 434

---

[5] *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U.S. 339 (1913); *Trustees of Joint Welfare Fund of Int'l Union of Operating Engineers* v. *Nolan*, 549 F.2d 871 (2d Cir. 1977); *Mabey* v. *Reagan*, 537 F.2d 1036 (9th Cir. 1976); and *United States* v. *Cline*, 388 F.2d 294 (4th Cir. 1968), Pet., p. 9, involved no challenges to orders of reference, and in *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940), the reference order was entirely peripheral to the issues on appeal. Moreover, unlike *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228 (5th Cir. 1982), Pet., p. 11, where the particular interlocutory order had not "disposed of the issues now before us," 669 F.2d at 235, and no action had been taken in the litigation between the interlocutory order and the order then on appeal, the Order of Reference in the present case fully disposed of the burden of proof issue and was followed by hundreds of trials. Moreover, as in *Chicken*, the Court below considered its decision "necessary for the efficient administration" of the particular case. *Compare* 669 F.2d at 235 *with* 9a.

F. Supp. 920, 934 (E.D. La. 1977) (dismissing belated claims on laches grounds even though time to proceed not yet extinguished by statutes of limitations).

The ruling below is fully consistent with these authorities. To permit McDonald "to hang back at the trial level," *Thompson* v. *Sawyer*, 678 F.2d 257, 287 (D.C. Cir. 1982), and then, after hundreds of entitlement claims have been decided, insist on a "second bite at the apple," *Cruz*, 515 F.2d at 331, because of an allegedly improper burden of proof, "is a trap play," *Thompson*, 678 F.2d at 287, which the Court of Appeals was not required to accept, particularly where, as here, prompt objection to the District Court's Order could have obviated any need for retrials. *E.g.*, *Rogers* v. *Societe Internationale*, 278 F.2d at 271; *Ellis* v. *City of Chicago*, 667 F.2d 606, 610 (7th Cir. 1981); *Skogen* v. *Dow Chemical Co.*, 375 F.2d 692, 703 (8th Cir. 1967). The Court's authority to take account of such considerations was no less because the issue involved was the appropriate burden of proof. *Browzin* v. *Catholic University of America*, 527 F.2d 843, 849-50 (D.C. Cir. 1975) (declining to alter the allocation of burden of proof, even though appellant's position, if timely advanced, might well have been meritorious). *See also Brenner* v. *World Boxing Council*, 675 F.2d 445, 456 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982).[6]

The Court of Appeals' determination to retain the burden of proof of the Order of Reference and not permit

---

[6] McDonald's suggestion that the Court below was under a different "obligation" because this is a Title VII case, Pet., p. 12, is misguided. The present appeals involved issues of eligibility for relief, not the measure of the relief to be afforded. When the remedial issues were before the Court, it fully recognized and applied the principles of *Franks*. 717 F.2d at 1157, 1159-60.

Similarly inappropriate is McDonald's suggestion that the Court should have insisted upon a different burden of proof for the remaining entitlement hearings from that applied in the 650 cases which have already been heard. Pet., pp. 12-13. There is no rationale for having different standards of proof govern this unitary claimant group.

multiple retrials does not reflect any "restriction of appellate jurisdiction." Pet., pp. 8-9. Assertion of jurisdiction did not dictate the Court's substantive treatment of McDonald's appeals, require that it ignore the pertinent facts in fashioning a result it considered "just under the circumstances," 28 U.S.C. § 2106, or render it powerless to protect the integrity of the judicial system from the consequences of McDonald's dilatory conduct.[7] *Cf. Williams* v. *Rhodes*, 393 U.S. 23, 34-35 (1968), *Kay* v. *Austin*, 621 F.2d 809, 813 (6th Cir. 1980), and *USAchem, Inc.* v. *Goldstein*, 512 F.2d 163, 168-69 (2d Cir. 1975) (upholding denials of relief because of tardiness of plaintiffs, although trial court rulings were based on other grounds). No case cited by McDonald suggests otherwise.[8]

C. While McDonald does not directly ask this Court to determine the appropriate burden of proof standard, the petition suggests that review is needed because the standard established by the Order of Reference allegedly conflicts with *Teamsters* and its progeny. Pet., pp. 11-12 and n.9, 13. However, *Teamsters*, far from creating an inflexible formulation regarding burden of proof, instructed that different standards would apply to different categories of claimants based on the nature of their claims, even where the employer's wrongdoing had already been established. 431 U.S. at 364, 367-71.[9] In con-

---

[7] AFA's challenge to appealability under 28 U.S.C. § 1292(a)(1) did not "acknowledge," Pet., p. 12, that the substantive disposition of a later appeal would differ in any respect from the ruling below.

[8] In *Baltimore Contractors*, Pet., p. 9, the Court rejected an effort to enlarge, not restrict, appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

[9] Cases following *Teamsters*, such as *McKenzie* v. *Sawyer*, 684 F.2d 62 (D.C. Cir. 1982) and *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982), Pet., p. 12 n.9, have also drawn distinctions in the showing required of claimants based upon the nature of the claims presented, as the District Court correctly noted. 23a.

formance with these guidelines and the 1978 ruling of the Court of Appeals, *McDonald*, 587 F.2d at 360 n.4, the District Court established a burden of proof standard "tailored to the realities of the case," 25a, requiring claimants to establish that their resignations were involuntary. The Court of Appeals reiterated its earlier requirement that resignees bear the burden of showing their entitlement, 6a n.2, recognized the need to take account of the "unique . . . factual setting" in this case, 8a, and did so in its decision.[10]

II. The Court Below Took No Action Regarding the District Court's Management of This Case Which Merits Supreme Court Review.

The Court of Appeals in no way "interfered with," "undercut," or displayed disrespect for the District Court's management of this case, as McDonald claims. Pet., pp. 13-15. It confirmed the District Court's decision that entitlement be determined through individual hearings before special masters under standards established in the Order of Reference.[11] When appeals were filed, the Court below did not decline jurisdiction, as in *Curtiss-Wright Corp.*, Pet., p. 14, but accepted the "dispatch" of the District Court, heard and decided the appeals. And unlike *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), and *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977), Pet., p. 15, where appellate courts improperly

---

[10] Despite the alleged erroneous standard of proof, claimants have been found entitled in over two-thirds of the decided cases. S.R.1266-1288.

[11] McDonald's depiction of a district court "management plan" involving "continuing review and refinement of the Order of Reference in light of the experience in actual hearings," Pet., p. 14, is unfounded. The District Court never altered its burden of proof standard. 9a.

altered orders or actions of the trial courts,[12] the Seventh Circuit did not modify the Order of Reference. It was McDonald's unnecessary and prejudicial delay in challenging the burden of proof standard, not the case management of the District Court, which met with the Court of Appeals' disapproval.

McDonald also errs in inflating certain comments of the District Court, following its rejection of McDonald's tardy challenge to the burden of proof, into an endorsement of the timing of McDonald's attack on the Order of Reference or a "welcome[] [of] appellate review as and when sought by petitioners." Pet., p. 12; also pp. 7, 14. The District Court merely (and understandably) indicated that any further challenge to the standard of proof be pursued on appeal. S.R.1239, Vol. 6 at 8. That the District Court reconfirmed its Order of Reference when reviewing appeals from individual entitlement determinations rather than simply refusing to address the burden of proof issue did not, as McDonald argues, Pet., p. 15 and n.12, require the Court of Appeals to ignore the timing of McDonald's challenge.[13] *See, e.g., Retail Store Employees Union, Local 782* v. *Sav-on Groceries*, 508 F.2d 500, 503 (10th Cir. 1975) (reviewing court can decline

---

[12] In *Piper*, the Court of Appeals reversed a dismissal on forum non conveniens grounds; in *Will*, the appellate court ordered the trial court to proceed immediately with an action it had deferred; in *Dayton*, the Court of Appeals, without record support, ordered a remedy far more sweeping than that ordered by the district court.

[13] McDonald erroneously suggests, Pet., p. 15 n.13, that the Court below sua sponte injected the concern for the timing of McDonald's attack on the burden of proof. AFA apprized the Court of Appeals, as it had the District Court, of McDonald's extensive delay in challenging the burden of proof standard and its potentially adverse consequences, given her demand for rehearings of all adverse entitlement determinations. AFA brief to Court of Appeals, pp. 6, 11-12 and nn.9 and 10, 21 n.21; R.945, p. 7 n.7; *see* McDonald reply brief to Court of Appeals, pp. 5-6. The issue was also specifically addressed at oral argument before the Court of Appeals.

to address basis for trial court ruling, yet affirm result); *Arlinghaus* v. *Ritenour*, 622 F.2d 629, 638 (2d Cir.), *cert. denied*, 449 U.S. 1013 (1980) (appellate court can raise decisive theory sua sponte). *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), and *Commissioner* v. *Gordon*, 391 U.S. 83 (1968), Pet., p. 15 n.12, suggest only that a reviewing court may decide an issue despite a procedural defect at the trial court level, not that it must ignore such defect or the factual circumstances of the case in reaching the decision it considers appropriate. Moreover, in neither *Fact Concerts* nor *Gordon* would a decision on the merits necessitate retrial; here, granting the relief sought by McDonald would have required hundreds of rehearings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN B. MOLDOF
(Counsel of Record)
PETER HERMAN
COHEN, WEISS AND SIMON
330 West 42nd Street
New York, NY 10036
(212) 563-4100
Counsel for Respondent
Association of Flight Attendants